UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

HOWARD EUGENE MCNIER, Complainant,	)	
	)	8 U.S.C. § 1324b Proceeding
v.	)	Case No. 97B00072
SAN FRANCISCO STATE UNIVERSITY, COLLEGE OF BUSINESS, Respondent.	)	**Marvin H. Morse,** **Administrative Law Judge**

ORDER GRANTING COMPLAINANT'S MOTION TO RECUSE DEFENSE COUNSEL
(December 2, 1999)

On September 27, 1999, Complainant filed a Motion to Recuse Defense Counsel, a transmittal letter, a memorandum of points and authorities, a narrative Declaration of Complainant and supporting documents of record in collateral state and federal court proceedings. The gravamen of Complainant's motion is that John L. Beers, a partner with Timothy Murphy in the law firm of Murphy & Beers, LLP, "served as a panel mediator in the mandatory settlement conference ordered by the Superior Court of California in McNier vs.Trustees of the California State University (#986713)" (Memo at 1), a case substantially akin to the § 1324b case before me. For that reason, Complainant argues, the law firm cannot be permitted to participate in this case. Specifically, Complainant contends that "in the course of said mandatory settlement conference, Plaintiff [McNier] told attorney Beers confidential information that he would never have told (nor would he tell the very same information even today) to opposing counsel." Id.

On September 30, 1999, Stephanie Leider (Leider) on the Murphy & Beers letterhead, filed a letter-pleading referring to Complainant's filing. Leider acknowledged that Beers had participated as a "neutral evaluator in February 1998 with regard to Mr. McNier's state court lawsuit" against San Francisco State University (SFSU). She argued that this fact "will not prejudice Mr. McNier in any of the matters he has filed against the University or its current or former employees, including this action, [since] Mr. Beers recalls nothing from the Early Settlement Conference, [and since] this firm established a 'cone of silence' around Mr. Beers before undertaking the defense of San Francisco State University and its current or former employees with regard to matters initiated by Mr. McNier."

On October 4, 1999, in an initial prehearing conference, as confirmed by the First Prehearing Conference Report and Order (October 5, 1999), I noted that, "my decision on

Complainant's Motion to Recuse Defense Counsel will be guided, but not controlled, by the ruling on a similar motion before the United States District Court, Northern District of California (subsequent to a scheduled October 22, 1999 hearing before that court);" Complainant was directed to forward a copy of the Court's ruling promptly after it became available.

On November 1, 1999, Complainant filed a copy of the Order filed October 22, 1999 by the District Court, in his case against Wallace, Sim and Leong, individually and in their respective capacities at SFSU. Captioned "Re: Plaintiff's Motion To Recuse Defendant's Attorneys," the Order recited in its entirety that,

> The above matter, having been heard on October 22, 1999 at 9:30 a.m. in the above-entitled court, and Good Cause appearing therefore:
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> IT IS HEREBY ORDERED that the law firm of Murphy and Beers, LLP, is disqualified from representing defendants in this case.

For the reasons discussed below, I conclude that the firm of Murphy & Beers, LLP, is disqualified from representing any respondents in this § 1324b case.

I. SELECTED RECENT PROCEDURAL HISTORY

1. My July 14, 1999 Order Granting Complainant Leave to Amend, 8 OCAHO 1030, asked the parties, inter alia,[1] to advise my office by July 26, 1999 of the identity of the representatives, if any, to participate in a telephonic prehearing conference.

2. Lacking a response on behalf of SFSU, by order dated September 15, 1999, served on counsel of record, I scheduled a conference for October 4, 1999.

3. By letter-pleading filed September 22, 1999, Stephanie Leider, for herself and Timothy Murphy, advised that they were recently retained by SFSU "to serve as counsel with respect to this matter [Case No. 97B00072], replacing Richard Tullis of the office of the Attorney General of California." The letter-pleading on the letterhead of Murphy & Beers, LLP, assured the bench that she and/or Timothy Murphy would be available for a telephone conference.

4. On September 27, 1999, Complainant filed his Motion to Recuse Defense Counsel (as summarized above).

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[1] By the order dated May 8, 1998, 7 OCAHO 998, I found San Francisco State University (SFSU) to be an arm of the State of California, and as such, exempt from liability under 8 U.S.C. §1324b. As contemplated at that stage, and as confirmed by the July 14, 1999 order, I held that under the ***Ex Parte Young***, 209 U.S. 123 (1908) exception to Eleventh Amendment state sovereign immunity, Complainant was granted leave to amend the Complaint to add as respondents certain named SFSU officials in their individual capacities.

5. On September 30, 1999, Leider filed the letter-pleading which referred to Complainant's filing, noting that "[A]s Mr. McNier stated, he has filed an almost identical motion to recuse Murphy & Beers in the federal court litigation now pending in California." Leider asserted that Beer's participation as a neutral evaluator in the California state-mandated settlement proceedings between McNier and SFSU in February 1998 will not prejudice Mr. McNier in this § 1324b action. She argued:

> Specifically, Mr. Beers recalls nothing from the Early Settlement Conference session with Mr. McNier other than the fact that the parties were too far apart to achieve a settlement. He does not recall that Mr. McNier shared any confidential information with him during that session and, thus, has not shared and will not share any such information with anyone else. In order to avoid any possible prejudice to Mr. McNier and any appearance of impropriety, this firm established a "cone of silence" around Mr. Beers before undertaking the defense of San Francisco State University and its current or former employees with regard to matters initiated by Mr. McNier. Accordingly, other than confirming that he served as the neutral evaluator in the February 1998 Early Settlement Conference Program, Mr. Beers has had no discussions with any other attorneys here or our staff about any litigation involving Mr. McNier. Nor has Mr. Beers had any access to any documentation or other information pertaining to the litigation involving Mr. McNier. The firm has established procedures to ensure that Mr. Beers will continue to be isolated from any and all information involving the litigation involving Mr. McNier, which is being handled by Mr. Murphy and myself. Finally, the firm's financial arrangements ensure that Mr. Beers will receive no remuneration from the firm's representation of the University or any of its current or former employees.

6. On October 4, 1999, Leider filed a second letter-pleading referring to Complainant's filing, offering "a copy of the opposition papers that Defendants Arthur Wallace, Janet Sim, and Kenneth Leong filed . . . in the federal action" as a response to Complainant's motion, since "Mr. McNier's arguments . . . are identical to those raised by him in support of the motion to recuse this firm from serving as defense counsel in the federal action [i.e., in the United States District Court, Northern District of California, No. C98-1040 CAL].

Additionally, Leider contended that although McNier claimed to have shared confidences with Beers in the latter's role as volunteer mediator in a February 1998 mediation session in the state court litigation, McNier "has never asserted that any of the alleged confidences shared with Mr. Beers had anything to do with the claims raised in these proceedings." Because "the immigration issues" before me "were not an issue in the state court litigation," counsel argued that,

> Mr. McNier therefore has a much greater burden of demonstrating that Mr. Beers' brief interaction with him in connection with very separate and distinct litigation

> justifies recusal of Mr. Beers' entire law firm in these proceedings, particularly in light of the screening procedures that have isolated Mr.Beers from any knowledge of or involvement in any litigation filed by Mr. McNier from the very first day that Murphy & Beers, LLP was approached about becoming defense counsel.

Suggesting that the firm would respond to questions from the bench at the scheduled conference, or thereafter, Leider offered "to submit a more formal response" to the recusal motion if I so requested.

7. As confirmed by the First Prehearing Conference Report and Order (October 5, 1999), at the October 4 conference I accepted SFSU's letter-pleading as a matter of information, and not as a response to Complainant's pending motion to recuse Murphy & Beers. Requiring "a more formal response" I said that Respondent might file a response to Complainant's Motion to Recuse Defense Counsel, in accordance with the pertinent rules of practice and procedure at 28 C.F.R. Part 68, specifically § 68.11(b), by October 13, 1999, and allowed exhibits to the firm's letter-pleading to be incorporated by reference into the response.

8. On October 13, 1999, Murphy & Beers filed Respondent's Opposition to Complainant's Motion to Recuse Counsel, accompanied by declarations, each individually, of Murphy and Beers.

9. On November 1, 1999, Complainant filed a copy of the Order filed October 22, 1999, by the United States District Court, Northern District of California which disqualified the law firm of Murphy & Beers, LLP from representing Wallace, Sim and Leong in McNier's case in that court.

II. ANALYSIS AND CONCLUSION

The three McNier cases, in state court, federal court, and the § 1324b case before the administrative law judge (ALJ) lack identity, but they are substantially related, each being employment discrimination and retaliation cases. The underlying factual allegations appear to arise out of an identical course of conduct. The causes of action differ only as to the type of workplace discrimination implicated by the substantive law allegedly violated.

The major difference between the § 1324b case and the state case in which Beers played a role as mediator is that any relief which follows from a finding of a violation of Title 8 USC § 1324b will be significantly different from that obtained in the state case. That difference, however, is insufficient in my view to overcome the taint that attaches from the fact of the Beers mediation role, particularly in light of the McNier assertion which Beers does not refute that disclosures were made during the settlement conference.

A. Conflict of Interest: Former Mediator

Pleadings by both parties discuss the distinctions among judges, arbitrators, and mediators. As there is no nationally recognized clearly defined distinction, I use for purposes of this ruling Rule 2.5 of the Local Rules for the United States District Court for the Northern District of California, concerning the obligations of "neutrals," which includes arbitrators and mediators. Rule 2.5 (e) states that all lawyers serving as neutrals in any of the court's Alternative Dispute Resolution (ADR) programs are performing quasi-judicial functions.[2] Additionally, I use the definition of a mediator from a federal court decision cited by both parties: "a mediator is an attorney who agrees [in the context of a court-supervised ADR program] to assist parties in settling a legal dispute, and in the course of assisting those parties undertakes a confidential relationship with them." *Poly Software Int'l, Inc. v. Yu*, 880 F. Supp. 1487,1493 (D. Utah 1995).

Regarding conflicts of interest, Rule 2-5 (d) states: "No lawyer may serve as a neutral in a case in a court ADR program in violation of the standards set forth in 28 USC § 455." Title 28 USC § 455 addresses circumstances compelling the disqualification of a justice, judge or magistrate. Foremost among these is that a person in an adjudicatory role shall disqualify him or herself in any proceeding in which his or her impartiality might reasonably be questioned, i.e., the "appearance of impropriety" standard determines the appropriateness of disqualification for persons in judicial or quasi-judicial roles.

American Bar Association (ABA) Rule 1.12 [of the ABA Model Rules of Professional Conduct] also provides guidelines by addressing conflict of interest issues with respect to persons who perform judicial functions. It states in pertinent part:

> (a) Except as stated in paragraph (d), a lawyer shall not represent anyone in connection with **a matter** in which the lawyer participated personally and substantially as a judge or other adjudicative officer, arbitrator or law clerk to such a person, unless all parties to the proceeding consent after consultation.
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> ...
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> (c) If a lawyer is disqualified by paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in the matter unless:
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> (1) the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom; and
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> (2) written notice is promptly given to the appropriate tribunal to enable it to ascertain compliance with the provisions of this rule.

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[2] Consistent with the categorization of a mediator as performing quasi-judicial functions are related provisions in the California Code of Judicial Ethics, as well as the San Francisco County Uniform Local Rules, which Respondent references.

> (d) An arbitrator selected as a partisan of a party in a multimember arbitration panel is not prohibited from subsequently representing that party. (Emphasis added).

As to what constitutes a matter, "[t]he same issue of fact involving the same parties and the same situation or conduct is the same matter...." *Poly Software Int'l, Inc.*, 880 F. Supp. at 1492 (citing *Securities Investor Protection Corp. v. Vigman*, 587 F. Supp. 1358, 1365 (C.D. Cal. 1984) quoting ABA Formal Op. 342 (Nov. 24, 1975), 62 A.B.A. J. 517, 519 (1976)).

As stated earlier, I find the same "matter" in terms of factual nexus and employment discrimination causes of action to exist between this § 1324b case and the California state proceedings in which Beers served as mediator, although obviously the individual respondents in this case were not before the state court as parties defendant.

The mediation process, absent a protracted or repeated dialogue with the parties, is unlikely to make much impression on the mind of the mediator. It is consistent with Beer's role as mediator, absent prolonged discussions, that he does not recall discussion of any substance and lacks any independent recollection of the mediation. However, "[w]here [...] settlement conferences [have] included ex parte communication, we presume the revelation of confidences relating to the merits of a litigant's case." *Cho v. Superior Court*, 45 Cal. Rptr. 2d 863, 869 (1996). Beers' lack of recollection of the settlement conference disables him from refuting McNier's account of disclosures at that conference. Therefore, it is unnecessary to resolve any dispute between the parties as to the substantive content of the confidential material disclosed by McNier during the mandatory settlement conference with mediator Beers.

I acknowledge the undisputed efforts by the firm to insulate Beers from the SFSU representation before me. Nevertheless, it can only be speculated whether, consciously or subliminally, some greater recollection might arise at a later date and in this concededly small firm of two partners and fewer than a handful of associates inadvertently or otherwise be communicated to the lawyers and the principals in the SFSU representation. Beers as mediator, for however limited a period of time, was charged with not only "being impartial, but with receiving and preserving confidences in much the same manner as the client's attorney." *Cho,* 45 Cal. Rptr. at 868 (quoting *Poly Software Int'l, Inc. v. Yu*, 880 F. Supp. 1487,1494 (D. Utah 1995)). It is reasonable to conclude that "[n]o amount of assurances or screening procedures, no 'cone of silence,' could ever convince [Complainant] that the confidences would not be used to [his] disadvantage." Id., at 870. "The rule of the cases is that a mediator should never represent a party to the mediation in a subsequent related or similar matter." *McKenzie Construction v. St. Croix Storage Corp*., 961 F. Supp. 857, 861 (D.V.I. 1997).

B. Imputed Disqualification

Since it is not Beers but rather his law firm which is representing a party to the litigation in a subsequent similar matter, ABA Rule 1.10, the general rule governing imputed

disqualification, is necessarily implicated. It states in relevant part:

> (a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 [Conflict of Interest: General Rule], 1.8(c) [Conflict of Interest: Prohibited Transactions (Gifts Pursuant to Execution of Lawyer-prepared Instrument)], 1.9 [Conflict of Interest: Former Client] or 2.2 [Intermediary between Clients].
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> ...
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> (c) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7.

For purposes of this discussion, Complainant is the "affected client."

Complainant's Motion to Recuse asks that the judge consider cases which rely heavily on Rule 1.9 (of the ABA Rules listed in 1.10(a) above) as a guideline. Rule 1.9 covers conduct of attorneys and law firms with respect to conflicts of interest with "former clients." Although no part of Rule 1.9 directly speaks to Complainant's situation as "former mediation participant," selected comments which annotate the rule are relevant.

> [3] If the concept of imputation were applied with unqualified rigor, the result would be radical curtailment of the opportunity of lawyers to move from one practice setting to another and of the opportunity of clients to change counsel.
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> [4] Reconciliation of these competing principles in the past has been attempted under two rubrics. One approach has been to seek per se rules of disqualification. For example, it has been held that a partner in a law firm is conclusively presumed to have access to all confidences concerning all clients of the firm. (Comment [6]: It should be inferred that a lawyer with general access to files of all clients of a law firm is privy to all information about all the firm's clients.)
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> [5] The other rubric formerly used for dealing with disqualification is the appearance of impropriety proscribed in Canon 9 of the ABA Model Code of Professional Responsibility.
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> More subtle questions arise when the lawyer did not actually represent the client seeking disqualification, but rather was privy to confidential information through involvement in a law-related procedure. See *Poly Software Int'l, Inc. v. Yu Su*, 880 F. Supp. 1487 (D. Utah 1995) (finding that Rule 1.9 instead of Rule 1.12 governs decision of whether lawyer's services as mediator should disqualify him from representing one party against another in subsequent litigation). See also Rule 2.2, Intermediary (if lawyer withdraws as intermediary, lawyer shall not continue to represent any clients in matter that was subject of intermediation).

This last comment makes clear that Rule 1.9 contemplates Complainant as a "former client" having "standing" to request recusal of counsel. Complainant's Motion to Recuse establishes unequivocally that he has not waived the disqualification which by analogy may be proscribed by the intersection of Rule 1.10 and Rule 1.9. I find that, however de minimus the actual confidential information may have been, and however effective the cone of silence created around Mr. Beers, Complainant's objection to the clear appearance of impropriety is appropriately raised.

C. Conclusion

The authority of the ALJ to recuse counsel derives from the authority conferred at 28 C.F.R. § 68.32, and from the inherent authority to supervise the professional conduct of attorneys appearing before the forum. *See Butz v. Economou*, 438 U.S. 478, 513 (1978).

I consider Complainant's Motion to Recuse Counsel to be governed by the ethical rules announced by the national profession in the light of the public interest and the litigants' rights. In particular, I rely on the general admonition of canon 9 of the ABA's canon of ethics that a lawyer should avoid "even the appearance of impropriety," and the specific guidelines suggested by ABA Rules 1.9 and 1.12 for disqualification based on the appearance of a conflict of interest. In this case, Complainant asserts legitimate concerns about being disadvantaged in this proceeding, which I must acknowledge. Respondent's Opposition to Complainant's Motion to Recuse, in contrast, does not identify substantive social interests which may be served by Murphy & Beers' continued participation in the case.

Considering additional factors, such as the ruling by the United States District Court and the consequential need for the selection of new counsel in the district court case, the importance of preserving standards of neutrality in a mediation system, and the difficulty inherent in insulating Beers in the small-sized Murphy & Beers firm, I conclude there is a real threat that the proceeding before me would be tainted by continued representation by current counsel. Indeed, the question persists as to why in the face of the District Court's order of recusal, the issue of Murphy & Beers, LLP's representation of SFSU endures to date.

That being decided, given that there is no infraction of a clearly established rule under a single governing ethical rubric, and that there is a paucity of literature and caselaw directly on point, I find that Murphy & Beers, LLP could reasonably have assumed no violation occurred in their decision to represent SFSU and any of its employees or former employees in litigation against McNier. No criticism of the professionalism of counsel is warranted or suggested by the result reached here.

III. ORDER

1. The Motion to Recuse Defense Counsel is granted.

2. The Amended Complaint, filed October 18, 1999, is accepted. See 28 C.F.R. § 68.9(e); Order Granting Complainant Leave to Amend, 8 OCAHO 1030 (July 14, 1999); First Prehearing Conference Report and Order (October 5, 1999). Murphy & Beers, LLP, are requested to provide copies of the amended complaint to each of the individuals named in the Amended Complaint.

3. The individual respondents are afforded 30 days from entry of appearance by substitute counsel to file their Answer to the Amended Complaint, provided, however that if no such entry is effected by Friday, January 21, 2000, I will consider issuing an order to show cause why a default decision adjudicating liability should not be entered.

SO ORDERED.

Dated and entered this 2nd day of December, 1999.

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Marvin H. Morse
Administrative Law Judge